STATE OF MICHIGAN
IN THE SUPREME COURT

THE ESTATE OF MARGARETTE F. EBY Deceased, by its Personal Representative, DAYLE TRENTADUE,	Docket Nos. 128623, 128624, 128625
Plaintiff-Appellee,	
v	
MFO MANAGEMENT COMPANY,	Court of Appeals Nos. 252155, 252207, 252209
Defendant-Appellant,	
and	
BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, SHIRLEY GORTON, LAURENCE W. GORTON, JEFFREY GORTON, VICTOR NYBERG, TODD MICHAEL BAKOS, and CARL L. BEKOFSKE, as Personal Representative of the Estate of RUTH R. MOTT, Deceased,	Genesee Circuit Court No. 02-074145-NZ
Defendants.	

DEFENDANT-APPELLANT MFO MANAGEMENT COMPANY'S REPLY BRIEF

***** ORAL ARGUMENT REQUESTED*****

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BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, SHIRLEY GORTON, LAURENCE W. GORTON, JEFFREY GORTON, VICTOR NYBERG, TODD MICHAEL BAKOS, and CARL L. BEKOFSKE, as Personal Representative of the Estate of RUTH R. MOTT, Deceased, ***Defendants.***	Genesee Circuit Court No. 02-074145-NZ

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FACTS: Reply

Defendant MFO has filed a Motion to Strike the fact portion of the Estate's brief (along with the section of argument where facts not of record are discussed). Regardless of whether that motion is granted, the "facts" at pages 7-9 of the Estate's brief (all set forth with no record references) were never presented to the trial court.

The statement that "each defendant concedes that plaintiff had no way of knowing the facts which would implicate a duty owed to Mrs. Eby by any of them . . . without first knowing who killed Mrs. Eby or the killer's relationship to the other defendants," Appellee Brief, p 6, is false. Argument III of MFO's brief raises, as in the lower courts, *exactly* the argument that the Estate did not need to know who killed Eby to discover the claim.

REPLY ARGUMENT I

The Estate's vicarious liability count against MFO was never properly supported in the trial court.

During the 13 months while the defense summary disposition motions were pending, the Estate did absolutely *nothing* to create any issue of fact on the question of whether MFO employed Nyberg and Bakos. This included nearly six months before oral argument in the trial court and more than seven months afterward before the opinion was released. Plaintiff claims that the failure to create a material issue of fact should be excused because (1) its attorney filed an affidavit stating that he believed that a deposition of MFO's representative would somehow disprove the affidavit testimony and (2) its counsel "sought the order of the court as to whether the parties were required to supplement the record and the trial court said they were not. (Apx 117a)."

The first argument has been debunked in MFO's opening brief. As for the second argument, this is what plaintiff's attorney asked at the page of hearing transcript being referred

to and it had *nothing* to do with asking the trial judge to enter an order that the record should be supplemented (or not):

> MR BINKLEY: And Your Honor, you don't wish any additional briefing to be served or filed, I presume, is that accurate? (Apx 117a)

Judge Ransom answered: "I believe you've all done a pretty thorough job of briefing and arguing." *Id.* Counsel for MFO argued about the failure of the vicarious liability claim. Apx 88a-89a. Counsel for the Estate made no answer to the argument at the hearing. Nothing that happened at the hearing excuses plaintiff's failure to join issue with MFO on the vicarious liability question or somehow excuses the failure to create a material issue of fact.

REPLY ARGUMENT II

> **Plaintiff is wrong that MFO is arguing "new and different reasons" for why and how plaintiff's claim accrued in 1986. MFO argued in the trial court and in the Court of Appeals, as here, that discovery of the claim against MFO need not await identification of Gorton as the perpetrator. Even if a common law discovery rule *is* applicable in this case, it was satisfied as to MFO.**

In the trial court, as here, MFO argued that the Estate "from the very get-go had a potential cause of action alleging that there was a breach of general security which caused the incident." Apx 86a. *Id* at 87a. This was part of MFO's argument in the Court of Appeals as well. See e.g. MFO's brief in the Court of Appeals, p 6: "Establishing the identity of Eby's attacker, through DNA analysis or otherwise, was never a necessary element of plaintiff's simple negligence claims against MFO."

In responding to MFO's Argument III, which contends that if a common law discovery rule applies it expired long before the Estate sued, the Estate accuses that MFO set up a straw man view of the complaint by characterizing Counts 6 and 8 as claims, essentially, of failing to keep Eby safe from her attacker. Count 6 pleads that MFO "owed a duty to plaintiff to prevent

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unsupervised access to the common areas below Eby's home." Apx 24a. Count 8 pleads that MFO "owed a duty to Eby to provide adequate security to prevent reasonably foreseeable harm." Apx 25a. These are both, and obviously, claims of failure to keep Eby safe from her attacker. There has been no mischaracterization.

Cases do not await accrual while a party figures out how to prove their case. The owner of a factory that burns down during a storm can't stall a statute of limitation while he decides if the fire was caused by lightening or defective wiring. A plaintiff injured in an auto accident must sue timely as reckoned by the blood on the pavement even when the accident scene is so horrific that piecing together how it happened and who is at fault is challenging. A plaintiff in a premises liability case who slips on milk in a convenience store can't successfully stall accrual of the claim until he can plead who spilled the milk and when. See MFO's appellant's brief, p 33-35 for case support.

Ten months before Eby was murdered, she was victimized by a home invasion that led her to demand action from Mrs. Mott in the form of installing an alarm system. This was "not the first time such an incident ha[d] taken place." Apx 55a. Eby repeated her request for an alarm system "with great urgency...in order to protect my person and property against possible future violations." *Id.* Mrs. Mott, via a letter signed by MFO's Yager, refused to install an alarm system. With those facts undisputed, the Estate could not simply wait to learn who the murderer was before filing suit against Eby's landlord and MFO, who the Estate claims functioned as the landlord's management company.

The argument that some "issue of fact" prevents this Court from discerning when the claim was or should have been discovered does not seem to be seriously presented. In any event, it should be rejected. The facts that matter are undisputed. The police did not identify Gorton as the perpetrator until 2002. Eby's letter complaining of security breaches and Mrs. Mott's response both pre-date the murder. The question of whether the estate possessed "at

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least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act," *Solowy v Oakwood Hospital*, 454 Mich 214, 226; 561 NW2d 843 (1997), is answerable by reference to these undisputed facts. "Once a claimant is aware of an injury and its *possible cause*, the plaintiff is aware of a possible cause of action." *Moll v Abbott Labs*, 444 Mich 1, 24; 506 NW2d 816 (1993).

REPLY ARGUMENT III

Late-blooming "third party" criminal act cases, where those who did not commit the crime are asked to pay damages for it, are the wrong kind of cases for applying common law discovery rules.

Plaintiff bristles at the argument that this Court should rein in application of a common law discovery rule in "third party" criminal act cases because such cases shift responsibility for violent crimes to persons who haven't committed them. It contends that MFO has failed to properly understand that public policy should embrace a discovery rule in order to assure the civil damages can be assessed against defendant MFO for the murder it didn't commit sixteen years before this lawsuit was filed.

When "third party" criminal act cases are successfully pursued, private citizens are brought to the bar of civil justice because they did not prevent a crime that a police force also could not prevent. Plaintiff, of course, is not wrong that Michigan abolished joint liability in the last round of tort reform and that MFO can only be made to pay damages to the extent of its own fault. But even under several liability, these types of cases still shift the responsibility for crimes *that others committed* and shift responsibility for crime prevention to the private business sector.

As an indicator of the Estate's twisted sense of public policy, it contends that: "In the present case, only Jeffrey Gorton could claim that the limitation period is not tolled by the discovery rule." Estate Brief against MFO, p 16. Plaintiff is led to such a conclusion in an

effort to escape the long-standing rule, expressed in many cases and discussed in MFO's brief at p 35, that discovery of a possible claim cannot await discovery of the tortfeasor's identity. So the statute of limitation protects the murderer under plaintiff's analysis of these cases, while those who did not commit the murder must pay damages? That application of a discovery rule to this case leads plaintiff to such a wrong-headed conclusion is one indication that the Court of Appeals erred in believing that a discovery rule applied.

REPLY ARGUMENT IV

Context-by-context examination of the applicability of a common law discovery rule should be abandoned. MCL 600.5827 is inconsistent with such an examination.

Most of the arguments raised by the Estate were never argued in the trial court or in the Court of Appeals. The Estate never sought equitable tolling. It never argued that the accrual rule of MCL 600.5827 did not apply or that the three-year limitation period of MCL 600.5805(10) somehow trumped §5827. It never raised any constitutional defense to defendants' arguments. Plaintiff has never before argued that MCL 600.5859 directs that, if no discovery rule can be implied from §5827, this Estate should get one anyway.

a. No statute has changed since 1986 when this claim accrued. MCL 600.5859 is not implicated.

This case is "about" when the Estate's claim accrued: in 1986 "when the wrong was done," as 600.5827 states, or sixteen years later when the murderer was identified. MCL 600.5869 says that "All actions and rights shall be governed and determined according to the law *under which the right accrued*, in respect to the limitation of such actions." The law has not changed since 1986. All the accrual statutes, as well as all the statutes of limitation that matter, read today as they did in 1986.

Plaintiffs argue that "the law," as referenced in MCL 600.5869, encompasses all case law. No case has ever held that. Under plaintiff's view, every movement of the case law

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refining our understanding of accrual and limitation statutes would be of no effect in the very case where the issue was decided and would not have the power to impact cases, at all, until causes of action arise after the release of the opinion. The notion is unsupported and unsupportable. The correct application of MCL 600.5869 is demonstrated by such cases as *Head v Children's Hospital*, 407 Mich 388; 285 NW2d 203 (1979). This Court examined the minority tolling statutes as they existed at the time the plaintiff was negligently treated in the first three months after her birth, accepted that was when the claim accrued, and applied §5869 to create access to lengthier minority tolling given the earlier version of the applicable statute. In accord, e.g., *Herman v Ford Motor*, 119 Mich App 639; 326 NW2d 590 (1982), using §5869 to reject defendant's reliance on a shorter disability tolling statute enacted after the accrual of plaintiff's claim.

b. MCL 600.5805(10), which sets a three-year limitation period, does not somehow trump the accrual rules of MCL 600.5827.

MCL 600.5827 begins with the sentence: "Except as otherwise ***expressly provided***, the period of limitations runs from the time the claim accrues." The statute continues on to state that "the claim accrues at the time provided in sections 5829 to 5838," all of which are sections that do not govern in general negligence actions. The Estate argues something that has never once been accepted in the jurisprudence of this state.[1] Namely, that MCL 600.5805(10), which merely sets a three year limitation period, is a statute that "expressly provides" for an accrual rule not contained within "sections 5829 to 5838" that creates a potential escape from §5827.

If that were true, which it is not, then the Estate loses because §5805(10) *also* does not contain a discovery rule. It sets a bright line "three year from death" limitation period: "The period of limitation is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." *If* §5805(10)

[1] Plaintiff has found no cases. Neither has MFO.

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governs and "the limitations period *must* run from the date of the plaintiff's injury" [Estate's brief (against Buckler), p 6, emphasis in original], what the Estate suggests is another way for it to lose this lawsuit.

c. This case does not merit application of equitable tolling.

Primarily by relying on *Devillers v Auto Club*, 473 Mich 562; 702 NW2d 539 (2005), where this Court declined to apply equitable tolling, the Estate seeks equitable tolling. *Devillers* reversed *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986) and held that recovery of personal injury protection benefits are limited to losses incurred within one year prior to the filing of the complaint, with no more *Lewis* tolling from the time a claim is submitted to the date the insurer formally denies liability. This Court applied the new rule retroactively to *Devillers* "and pending cases in which a *Lewis* challenge has been preserved."

Of course the majority in *Devillers* accepted that courts possess equitable powers.[2] But because "there has been no allegation of fraud, mutual mistake, or any other 'unusual circumstance' in the present case," this Court wrote "there is no basis to invoke the Court's equitable powers." *Id* at 591. Without citation to any authority except *Devillers*, discussing *Bryant v Oakpoint Villa*, 471 Mich 411; 684 NW2d 864 (2004), the Estate urges that equitable tolling should apply. It appeals to "unique and compelling" "circumstances" and claims this case involves "a pin-point (case by case) application of equitable tolling rather than a blanket rule." Appellee Brief (Buckler), p 11. *Devillers* does not support plaintiff's argument. *Devillers* holds that equitable estoppel is limited to cases of "fraud and mutual mistake," which is not claimed here, and cases of "unusual circumstances," which the majority explained at footnote 64 as "unusual circumstances such as fraud" and "intentional and negligent conduct designed to induce a plaintiff from bringing a timely action." *Id* (cites omitted).

[2] Const 1963, art 6, §5.

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Bryant, supra, was no aid to the plaintiff in *Devillers* and it is no aid here. The *Devillers* majority explained at n 65 that, in *Bryant*, "there was no controlling statute negating the application of equity." *Here*, there is such a statute: MCL 600.5827. In *Devillers*, the majority emphasized that there was a "preexisting jumble of convoluted case law through which the plaintiff was forced to navigate," *id* at n 65, namely the distinction between ordinary and professional negligence (which is no creature of statute). Here the clarity of the statute is impressive as is, MFO submits, the clarity of the case law directing that discovery of claims cannot wait discovery of who to sue or exactly how the claim will be proven.

See also *Cameron v Auto Club*, 476 Mich 55; 718 NW2d 784 (2006) (rejecting the dissent's appeal to apply minority/insanity tolling in the context of the one-year-back rule examined in *Devillers*; "We cannot revise, amend, deconstruct, or ignore their [legislators'] product and still be true to our responsibilities that give our branch only the judicial power" and rejecting application of "absurd results" analysis); *Ward v Siano*, ___ Mich App ___ (2006); 2006 Mich App LEXIS 3302, decision of a special conflict panel (wrongful death plaintiff may not rely on equitable tolling to escape the retroactive effect of *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004); the doctrine "is not permissible if it is inconsistent with text of the relevant statute"; "[J]udicial tolling is generally unavailable to remedy a plaintiff's failure to comply with express statutory time requirements," citing *Secura Insurance v AutoOwners*, 461 Mich 382, 387-388; 605 NW2d 308 (2000) and *Garg v Macomb Co Cmty Mental Health*, 472 Mich 263, 285 n12; 696 NW2d 646 (2005); "Inequities that justify judicial tolling must arise independently of the plaintiff's failure to diligently pursue the claim in accordance with the statute," citing *Devillers*, *supra* at 586, 590-592).

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d. What the Legislature said in 5827 is what matters; not what it didn't say and not what it said in other statutes.

The Estate insists that it is not raising the discredited "legislative acquiescence" argument[3] (that if the Legislature did not intend to create a discovery rule it would have amended §5827 by now) and that it argues from the Legislature's words and not from its silence. But the words that plaintiff looks to are the words of statutes *other than* §5827 Plaintiff urges that the Legislature has "spoken" in 600.5838 and 5838a (creating a discovery rule shorter than the limitation period for professional malpractice) and that somehow by creating statutory discovery rules the Legislature has endorsed the common law ones.

The Estate's argument is all inside out. The Legislature enacted §5827 without any discovery rule. It carved out the exception for accrual rules other than "at the time the wrong upon which the claim is based was done" by specifically referencing 5829 to 5838—where some discovery rules are enacted.[4] Discovery rules are also found in other statutes of limitation.[5] Looking to statutes other than §5827 to provide evidence of some generally applicable discovery rule is looking to the wrong sets of words. The discovery rule, if it exists, must exist in MCL 600.5827 or it runs afoul of core principles of statutory construction that the majority of this Court has respected in many cases. In fact, once the Legislature has spoken, as

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[3] See e.g. *Devillers, supra* at n 66; *Donajkowski v Alpena Power*, 460 Mich 243, 261; 596 NW2d 574 (1999) ("[L]egislative acquiescence is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence"); *Roberson v DaimlerChrysler*, 465 Mich 732, 760 n15; 641 NW2d 567 (2002) ("[T]he dissent's 'legislative acquiescence' argument is merely another way of sustaining forever any precedent, no matter how wrongly decided'); *Paige v City of Sterling Heights*, 476 Mich 494, 516-517; 720 NW2d 219 (2006) (rejecting legislative acquiescence arguments as inconsistent with separation of powers principles: "[W]e cannot 'amend' statutes and [that] view is directly at odds with our own Constitution;" what is required is a "truth-in-reading" approach to statutory construction where "texts should be approached using the same doctrines every time," *id* at 514).

[4] Sections 5838 and 5838a set discovery rules for professional malpractice and §5833 includes a discovery rule for claims of breach of warranty of quality or fitness for a particular purpose.

[5] See, e.g., MCL 600.5839, the architect and contractors statute; MCL 450.1489(f), shareholder actions; MCL 600.5855, fraudulent concealment.

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it did in §5827 without mention of a discovery rule, to create one anyway--whether by "interpretation" or "equity"--threatens violation of the doctrine of separation of powers:

> [I]f a court is free to cast aside, under the guise of equity, a plain statute...because the court views the statute as "unfair," then our system of government ceases to function as a representative democracy. No longer will policy debates occur, and policy choices be made, in the Legislature. Instead, an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity. While such an approach might be extraordinarily efficient for a particular litigant, the amount of damage it causes to the separation of powers mandate of our Constitution and the overall structure of our government is immeasurable. *Devillers*, *supra* at 556-557.

See also *Crown Tech Park v D & N Bank*, 242 Mich App 538, 548-549 n4; 619 NW2d 66 (2000) (violation of separation of powers doctrine would occur if plaintiff could use judicially created doctrine of promissory estoppel to circumvent the statute of frauds).

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